(Cap 81) to order the sale of the land and I would dismiss this originating summons with costs to the defendant.

Summons dismissed.

Solicitors: *Sulong Matjeraie & Co; Ernest Chua & Co.*

Reported by *Kevin Mathews*

Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO KG 638 OF 1986
HAIDAR J
14 JULY 1989

Civil Procedure — Intention to proceed — Failure to give one month's notice of — Whether nullity of proceedings or mere irregularity — Discretion of court to set aside proceedings — Rules of the High Court 1980, O 2 r 1(1) & O 3 r 6

Civil Procedure — Order 18 application — Delay in taking out application — Whether delay fatal — Whether oral evidence by counsel may be given to explain delay

The first defendant appealed against the senior assistant registrar's decision dismissing the preliminary objection in respect of an O 18 application by the plaintiff. The first defendant contended that (a) the plaintiff did not comply with O 3 r 6 in failing to give the first defendant one month's notice of its intention to proceed with the application; and (b) the inordinate delay in filing the application was fatal in this case.

Held, dismissing the defendant's appeal:

(1) Order 3 r 6 applies to interlocutory proceedings before final judgment and an O 18 application is an interlocutory proceeding; as such the plaintiff's application was caught by O 3 r 6 and hence one month's notice must be given to the first defendant. However, O 2 r 1(1) provides that the failure to comply with the rules was an irregularity and should not nullify the proceedings. It was therefore curable on terms. Nevertheless, the court retains the discretion to set aside either wholly or in part the proceedings.

(2) In exercising its discretion to correct irregularities, the court will consider whether the opposite party had suffered prejudice as a result of non-compliance. The plaintiff's summons-in-chambers was served on the first defendant on 23 January 1989, which was 44 days before the hearing of the plaintiff's application on 7 March 1989. Therefore, the first defendant had ample notice to prepare itself and there is no reason why the first defendant was in any way prejudiced as a result of the plaintiff's failure to give the one month's notice.

(3) There was delay in the O 18 application but such a delay is not fatal and may be made even after pleadings are closed. The delay was explained orally by counsel for the plaintiff and as the senior assistant registrar was prepared to accept the explanation to account for the delay, there was no good reason to question his acceptance of the explanation. Although ideally such explanation should be in the form of affidavit evidence, it is not wrong for counsel who has personal knowledge of the grounds for the delay to do so orally. As such, the senior assistant registrar has exercised his judicial discretion correctly and there is no reason to disturb it.

Cases referred to

1 *May* v *Wooding* (1815) 3 M & S 500; 105 ER 698 (refd)
2 *Bank Bumiputra Malaysia Bhd & Anor* v *Lorrain Esme Osman & Ors* [1987] 2 MLJ 633 (refd)
3 *Ong Lean Sim & Anor* v *Tio Kah Hin & Ors* [1985] 1 MLJ 270 (refd)
4 *Tucker* v *Collinson* (1886) 34 WR 354 (refd)
5 *Huo Heng Oil (EM) Sdn Bhd* v *Tang Tiew Yong* [1987] 1 MLJ 139 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 1(1), O 3 r 6, O 56 r 1(1)

Salang Hon (Mrs) for the plaintiff.
Authur Lee for the defendant.

Cur Adv Vult

Haidar J: This is an appeal by the first defendant under O 56 r 1(1) of the Rules of the High Court 1980 against the decision of the senior assistant registrar on 8 March 1989 dismissing the first defendant's preliminary objection in respect of an O 18 application by the plaintiff. The first defendant advanced two grounds, namely:

(1) the plaintiff's non-compliance with O 3 r 6 in failing to give to the first defendant one month's notice of its intention to proceed with an application under O 18;
(2) inordinate delay in filing the application under O 18.

Ground (1)

Order 3 r 6 reads:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule.

According to *Mallal's Supreme Court Practice* (2nd Ed) at p 16, the word 'proceeding' indicates a step 'towards' judgment and the rule, therefore, applies only when judgment has not been entered up; in other words it refers to an interlocutory proceeding before final judgment. An O 18 application, in my view, is an interlocutory proceeding and as such the plaintiff's application is caught by O 3 r 6 and hence one month's notice must be given to the first defendant. It is not disputed that no one month's notice was given by the plaintiff. What then is the effect of the non-compliance of O 3 r 6 by the plaintiff in this case? Mr Arthur Lee, for the first defendant, strenuously argued that the word 'must' used therein should be construed as 'shall' thereby having mandatory effect and thus the plaintiff's application should be dismissed. But O 2 r 1(1) provides:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any

proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

The rule is clear. The failure to comply with it is an irregularity and shall not nullify the proceedings. It is curable on terms. Nevertheless, the court retains the discretion to 'set aside either wholly or in part the proceedings, etc' (see p 9 of *Mallal's Supreme Court Practice* (2nd Ed)).

In exercising its discretion to correct irregularities, the court will consider whether the opposite party has suffered prejudice as a result of the non-compliance. According to the commentary in the *Supreme Court Practice* 1988 (Vol 1) at p 10 under the heading 'Exercise of discretion to correct irregularities':

> In most cases the way in which the court exercises its powers under O 2 r 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the irregularity, but the rule is so framed as to give the court the widest possible power to do justice. Hence, prejudice, or lack of prejudice, although after the all-important factor in the exercise of the discretion, is not always the only relevant factor.

The reason for the rule was stated by Lord Ellenborough CJ in *May* v *Wooding*[1] in these terms:

> The reason for the rule is this, that while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he may prepare himself, but when the matter has passed in rem judicatam by the verdict, the same reason does not apply. The rule of this court therefore relates merely to interlocutory stages of the cause.

The plaintiff's summons-in-chambers dated 28 November 1988 was served on the first defendant on 23 January 1989 which was 44 days before the hearing of the plaintiff's application on 7 March 1989. Therefore the first defendant, in my view, had ample notice to prepare itself and I do not see how the first defendant was in any way prejudiced as a result of the plaintiff's failure to give one month's notice as required by O 3 r 6. Mr Arthur Lee submitted that had the first defendant been given the necessary notice, then the first defendant would have taken the necessary steps to file a summons-in-chambers to strike out the plaintiff's summons and statement of claim for want of prosecution. With respect, I do not see any merit in such a submission as the first defendant could very well have taken such action earlier on if the plaintiff is sleeping on the case without having to be alerted by a notice as alleged. In the circumstance the preliminary objection of the first defendant on this ground fails.

Ground (2)

The first defendant's counsel submitted that there was a delay on the part of the plaintiff in taking out the O 18 application after the close of the pleadings and there was no valid reasons advanced for the delay, and he went on further to assert that such reasons should be explained in an acceptable manner, namely, by affidavit evidence. That there is a delay, I think, is not disputed.

On the issue of delay in an O 18 application, Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd & Anor* v *Lorrain Esme Osman & Ors*[2] at p 635 said:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice 1985* (vol 1) at p 304.

Mohamed Dzaiddin J in *Ong Lean Sim & Anor* v *Tio Kah Hin & Ors*[3] at p 272 also was of the view that delay is not fatal, quoting Brett MR in *Tucker* v *Collinson*:[4] 'the application may be made even after the pleadings are closed'.

In this case, the matter is not set down for trial and as such the delay, in my view, is not fatal. Before the senior assistant registrar, the delay was explained orally by the counsel for the plaintiff, Mrs Salang, to him and the senior assistant registrar was prepared to accept the explanation offered by her to account for the delay in making the application. I do not see any good ground to question his acceptance of the explanation for the delay. However, Mr Arthur Lee seemed to say that such explanation should be by way of affidavit evidence. Though ideally, perhaps, such explanation may be in the form of affidavit evidence, I do not see anything wrong for counsel who has personal knowledge of the grounds for the delay to do so orally. In this respect, Chong Siew Fai J in hearing an appeal case from the subordinate courts accepted the oral explanation of the counsel for the delay in the case of *Huo Heng Oil (EM) Sdn Bhd* v *Tang Tiew Yong*[5] where at p 140 his Lordship said:

> At the hearing of this appeal, counsel for the appellant stated that the reasons for the delay in making the application were that the managing director of the appellant company was away travelling and that accounts were involved and needed time to prepare. In the light of what was stated, I am of the view that the delay is not inordinate and does not defeat the application.

In the circumstances, I am of the view that the senior assistant registrar has exercised his judicial discretion correctly and there is no reason for me to disturb it. I would therefore affirm his decision and dismiss this appeal. In my opinion, the senior assistant registrar also correctly ordered that each party bears his own costs and

similarly I would order that each party bears his own costs in respect of this appeal.

Appeal dismissed.

Solicitors: *Dr Yaacob & Ismail Advocates; Lim Tan & Partners Advocates.*

Reported by *Yap Shao Sin*

Hsu Seng v Chai Soi Fua

HIGH COURT (KUCHING) — SUIT NO KG 312 OF 1987
HAIDAR J
6 JULY 1989

Civil Procedure — Summary judgment — Striking out defence — Delay in filing application — Whether oral explanation for delay acceptable — Admissibility of oral evidence — Omission to plead allegation in defence — Whether can be made good by affidavit evidence — No reasonable defence — Scandalous, frivolous, vexatious — Prejudice, embarrass or delay of fair trial — Abuse of process — Evidence Act 1950, s 92 — Rules of the High Court 1980, O 14 & O 18 r 19(1)

Contract — Assignment — Agreement for sale and purchase of property — Time of the essence — Failure of performance — Whether agreement voidable — Effect of void agreement — Agreed liquidated damages — Whether reasonable compensation — Contracts Act 1950, ss 40, 56(1), 65 & 66

By a deed of assignment dated 28 May 1985, one Hsu Hua, with the defendant's consent, assigned to the plaintiff all his right, share, interest and liabilities in a written agreement between himself and the defendant for the purchase of a certain property. Pursuant to the agreement, Hsu Hua had paid the defendant a sum of $72,000 as a deposit and/or part payment towards the purchase price of $120,000. Under cl 5 of the agreement, the defendant undertook to complete the road construction and obtain the documents of title to the property within a stipulated period. In the event that the defendant failed to do so, the plaintiff was, under cl 6, to allow the defendant a further six months to perform during which agreed liquidated damages of $1,000 per month were to be paid to the plaintiff. If the defendant still failed to perform, it was further provided that the sum of $72,000 would be refunded to the plaintiff as agreed liquidated damages together with the value of improvements made by the plaintiff to the property. Clause 13 provided that time was to be of the essence of the agreement. Upon the defendant's failure to perform the aforesaid obligations, the plaintiff commenced proceedings for the refund of $72,000 and damages and applied for judgment under O 14, alternatively under O 18 r 19(1), of the Rules of the High Court 1980.

The defendant contended that (a) the O 14 application should be dismissed in view of the delay in filing of about six months from the filing of the defence; (b) the principle governing an application under O 14 or O 18 was fundamentally the same, ie it should be made promptly and had to be a plain and obvious case; (c) the plaintiff had been verbally informed that it was impossible for the defendant to complete the road construction and obtain the documents of title within the time stipulated; (d) upon being informed as aforesaid, the plaintiff had agreed not to demand or sue for the refund and damages as long as the property was transferred to him upon the final payment of the purchase price; and (e) as the road construction had been taken over by the district council, the defendant had no control over the same.

Held, allowing the plaintiff's application:

(1) As the facts pertaining to the delay are within the personal knowledge of counsel, the oral explanation for the same could be accepted by the court although ideally such explanation should be by affidavit to enable the other party if he wishes, to challenge the facts relied on.

(2) Assuming the court to be wrong as to the mode of explanation for the delay, the plaintiff's alternative application under O 18 r 19 could proceed as the action had not yet been set down for trial.

(3) As time was of the essence of the agreement, upon the defendant's failure to perform her obligations, the agreement became voidable by the plaintiff in accordance with s 56(1) of the Contracts Act 1950. Upon the plaintiff's exercise of his option to annul the agreement, it follows that any person who has received any advantage under such agreement which becomes void, is bound to restore it to the person from whom it was received. Accordingly, the $72,000 paid should be refunded to the plaintiff.

(4) As the terms of the agreement had been reduced into writing, s 92 of the Evidence Act 1950 rendered inadmissible oral evidence to contradict, vary, add to or subtract from its terms. The alleged representation to the plaintiff that the defendant's obligations could not be performed is therefore inadmissible. In any event, in view of the circumstances, it is not plausible that such representation was made.

(5) As it was the court's opinion that no such representation was made, the issue of estoppel fails.

(6) The defendant's allegation that the road construction had been taken over by the district council should not be considered as it was not pleaded in the defence and such omissions could not be made good by affidavit evidence.

(7) The distinction between liquidated damages and penalty has ceased to be of great legal importance as the result in either case is that the court must determine reasonable compensation. Had the plaintiff placed the sum of $72,000 on fixed deposit instead of paying the defendant, the interest which would accrue would have been more than the sum of $6,000 liquidated damages agreed upon. As such, this agreed sum was reasonable compensation.

(8) It is obvious and clear that the defence discloses no reasonable defence, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action and is an abuse of the process of the court.

(9) Judgment would be entered for the plaintiff for the refund of $72,000, agreed liquidated damages of $6,000, interest on $78,000 at 8% pa from the date of judgment to payment and costs.

Cases referred to

1 *Krishnamurthy & Anor* v *Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (folld)
2 *Huo Heng Oil Co (EM) Sdn Bhd* v *Tang Tiew Yong* [1987] 1 MLJ 139 (refd)